

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

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THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 598.
v.	
LUTHER JEROME SMULL.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.*

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## **MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General, and, in accordance with the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, moves the court to advance this cause for hearing on a day convenient to the court during the present term.

Smull was indicted for perjury under section 125 of the Criminal Code, alleged to have been committed in making a false affidavit in support of a homestead application, the applicant stating that he had not theretofore made any entry for public lands under the homestead laws, whereas in truth and fact he had some years before made an entry for 160 acres, the maximum quantity allowed by law, and had acquired title thereto under the name of Lue Smull.

A demurrer to the indictment was sustained and the indictment dismissed upon the ground that it stated no crime, the court holding that the statute did not expressly require an applicant to make such affidavit, but that the requirement was one merely imposed by regulations of the Interior Department, which did not have the force of law, and hence that an indictment for perjury did not lie.

The question is an important one in the administration of the public land laws relating to homesteads.

Opposing counsel concur.

JOHN W. DAVIS,  
*Solicitor General.*

OCTOBER, 1914.



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## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case is here on a writ of error sued out under the criminal appeals act to review a judgment sustaining a demurrer to an indictment for perjury.

The indictment, after setting forth in full the form of affidavit required of those who seek the benefits of the homestead laws (R., 1-3), charges that on April 29, 1912, the defendant appeared before the receiver of the United States land office at Portland, and, in support of an application made by him in the name "Lue Smull" to enter 160 acres under those laws, executed and verified an affidavit or deposition (set out in full, R., 4), which, *inter*

*alia*, contained the statement: "I have not heretofore made any entry under the homestead laws" (R., 5). This statement the indictment thereupon falsifies by averring that previously, on August 20, 1900, under the name "Jerome Smull," the defendant had made another homestead entry for 143.95 acres at the local land office at Spokane Falls, Wash., upon which he had obtained patent March 26, 1904. (R., 6.)

The theory upon which the general demurrer (R., 8) was sustained will appear from the following extract from the memorandum filed by the district judge (R., 8):

The indictment charges Smull with the crime of perjury in falsely and corruptly swearing in a homestead application that "I have not heretofore made any entry under the homestead law," whereas in truth and in fact he had made such entry. Demurrer on the ground that the indictment does not state a crime under any law of the United States.

Perjury is falsely testifying under oath "in any case where a law of the United States authorizes an oath to be administered." (Section 215 [125], Penal Code.) It is admitted that there is no law of the United States expressly requiring a homestead applicant to make oath as to whether he had made a previous entry, but it is sought to sustain the indictment on the theory that the oath taken by the defendant is required by the rules and regulations of the Land Department made in pursuance of authority

conferred by sections 161, 411, 453, 2246, and 2478 of the Revised Statutes. It is, I take it, settled that an indictment for perjury under section 125 of the Penal Code can not be based on an affidavit not authorized or required by any law of the United States, and that the sections of the Revised Statutes referred to confer administrative powers only on the officers of the Land Department, and that a homestead claimant making an affidavit not required by section 2191 is not guilty of perjury, although the affidavit was made in pursuance of the regulations of the Land Department. (*U. S. v. George*, 228 U. S., 14; *U. S. v. Maid*, 116 Fed., 650.)

The demurrer is therefore sustained.

#### ASSIGNMENTS OF ERROR.

We rely upon the following assignments of error:

The court erred in not holding that section 2298 of the Revised Statutes of the United States, taken with sections 453, 2246, and 2478 thereof, authorized the Land Department of the United States to require an applicant for homestead entry of public lands to make affidavit as to whether or not and to what extent he has previously had the benefit of the homestead laws.

The court erred in holding that section 2290 of the Revised Statutes of the United States inhibits the Land Department from requiring an applicant for a homestead entry to make oath to any matters other than those in that section described, and especially that it inhibits the Land Department

from requiring such an applicant to make oath as to whether and to what extent he has previously had the benefit of the homestead laws.

**STATUTES INVOLVED.**

The Criminal Code, section 125:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

Revised Statutes, section 2289:

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands,

at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Revised Statutes, section 2290, as amended by the act of March 3, 1891 (26 Stat., 1098):

That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith

to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified.

**Revised Statutes, section 2298:**

No person shall be permitted to acquire title to more than one-quarter section under the provisions of this chapter.

**Revised Statutes, section 2478:**

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

**Revised Statutes, section 453:**

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale

of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [agents] [grants] of land under the authority of the Government.

Revised Statutes, section 2246:

The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

As aids in the construction of the foregoing we will invite attention also to the act of May 20, 1862, (12 Stat., 392), the original homestead law from which sections 2289, 2290, 2298, and 2478, *supra*, were derived, and to the act of March 3, 1857 (11 Stat., 250), the fifth section of which was absorbed in section 125 of the Criminal Code, *supra* (R. S., 5392), and sheds light upon its scope and meaning.

#### ARGUMENT.

The case was one in which the laws of the United States authorized the oath, and the false matter was material within the meaning of section 125 of the Criminal Code.

The requirements of this section were satisfied if the oath was taken before a competent officer, in a case in which a law of the United States *author-*

*ized* an oath to be administered, and if the false matter was *material* to the case or inquiry. The competency of the receiver was not questioned and is not open to question. (R. S., 2246, *supra*.) Neither does the court's opinion indicate that the materiality of the false matter was doubted. The conclusion seems to have been based entirely upon the theory that, in respect of that particular matter, the oath was not authorized by a law, and this theory in turn appears to have proceeded either from the idea that an oath, to be "authorized" must be authorized in specific terms by some statute, or from the idea that because section 2290 specifies certain things which must be covered by the claimant's affidavit, the inclusion of other things, though equally material to the validity of his claim, is thereby impliedly forbidden. We are confident that neither of these ideas is warranted.

1. *The homestead law expressly forbids the making of second entries, such as was attempted in this case, and charges the Land Department with the duty of preventing them.*

Section 2298, *supra*, declares:

No person shall be permitted to acquire title to more than one-quarter section under the provisions of this chapter.

Section 2478, *supra*, provides:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and

carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

These two sections, though found in separate chapters of the revision, were both taken from section 6 of the original homestead law of May 20, 1862 (12 Stat., 392, sec. 6), the language there used being:

That no individual *shall be permitted* to acquire title to more than one-quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby *required* to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect.

We have here an express prohibition and, in the same breath, a command upon the Executive to enforce it by regulations. It seems superfluous, then, to say that the enforcement was not intended to be left entirely to the good faith and honesty of the homestead applicant. Beyond a doubt it is the duty of the department to prevent by all appropriate means the prohibited entries, and the fraud and illegal appropriation of public land which they involve.<sup>1</sup>

The correctness of this proposition is not to be obscured by isolating section 2290. That section

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<sup>1</sup> Without regard to acreage, one enjoyment of the homestead privilege exhausts the right. (See 3 L. D., 509, 511; 5 L. D., 124; 5 L. D., 133; 36 L. D., 96.)

is part of the same title in which the other two appear, and, in its original form, was included with them in the very same act—the act of May 20, 1862, *supra*, section 2—and it must of course be construed so that they may be effectuated rather than destroyed. It is not to be taken therefore as intending literally that when the applicant files an affidavit covering only the particular matters which it specifies, “he shall thereupon be permitted to enter the amount of land specified” in his application, whether he has already secured the full benefit of the law or not. The prohibition of section 2298 stands as a proviso qualifying and conditioning the entire law and entering as fully into the substance of section 2290 as though it were written there in words.

In the case of *Leonard v. Lennox* (181 Fed., 760, 767)—a decision by the Circuit Court of Appeals for the Eighth Circuit, in which the opinion was delivered by his honor Mr. Justice Van Devanter when circuit judge—it was decided that notwithstanding the peculiar language of section 2290, a homestead applicant must comply with the regulation of the Land Department requiring his affidavit that the lands were not saline in character.

“The prohibition against the acquisition of mineral, coal, and saline lands under the homestead law does not arise,” said the court, “from anything contained in that

law, but from provisions in the mineral, coal, and saline land laws, which take precedence over and qualify the homestead law in that regard. Section 2290 is a part of the general homestead law and relates to the enforcement of its restrictive provisions, but not to the enforcement of the prohibitive or qualifying provisions of the mineral, coal, and saline land laws. As to the latter, the means of enforcement are not specially prescribed by statute and so may be designated by Executive regulation under sections 441, 453, and 2478 of the Revised Statutes, which empower the Commissioner, under the direction of the Secretary, to enforce, 'by appropriate regulations,' every part of the public land laws, as to which it is not otherwise specially provided."

The decision in that case, as we read it, was not based upon the proposition that the laws reserving minerals had repealed, *pro tanto*, the law granting homesteads, but upon the duty of harmonizing statutes, wherever possible, to prevent one from overturning another when not manifestly so intended. In essence, the decision supports our position. Its doctrine is that where a matter *in pais* is vital to the validity of a homestead application the department may require the applicant to show the facts, and show them under oath, even though the literal requirements of section 2290 are thereby exceeded.

2. *In the performance of this duty it is not merely convenient but essential that the department examine the applicant concerning the existence of a former entry, and therefore the duty to make the examination is a duty springing directly from the homestead law itself and covered by its specific requirement (R. S., 2478) that every part of it shall be enforced by appropriate regulations.*

Concerning the right to interrogate we apprehend no difficulty. The law nowhere says that the applicant may *not* be so interrogated, and we submit that no reason for such a prohibition could be imagined as commending itself to the wisdom and providence of Congress. If the applicant may not be asked this simple question, the most natural, the most direct, and often the only existing source of the requisite information is blindly closed, and the statute, in a measure, becomes *felo de se*, an invitation to the very frauds or mistakes which it defines and condemns. For the fact that another entry has been made is a fact which most frequently will rest in the bosom of the applicant himself, especially so where, as in the case at bar, a deliberate circumvention of the statute is attempted by resort to different names at different land offices. Even if the same name were employed once, and after an interval again, at the same land office, there would be danger that the fact might escape official notice, though the records there, if carefully examined, would suggest it. But

when the same name is employed the second time at a different office, there will be nothing in the records of that office to indicate that the same person had previously made entry elsewhere; and when different names are used in different land districts, the most painstaking examination of all the records of the Government would fail to arouse the least suspicion of the fraud.

Interrogation of the applicant is therefore not only a natural and reasonable precaution; it is actually necessary to the enforcement of the prohibition against excessive entries. This circumstance alone would be enough to compel an implication of the authority from the general duty to execute the homestead law. But we are not obliged to rely on implication; the authority is granted and its exercise enjoined expressly by section 6 of the original homestead act, *supra*, incorporated into section 2478 of the Revised Statutes. An interrogation of the applicant concerning former entries being essential, a rule or regulation requiring it is therefore both "proper" and "necessary" within the meaning of the original act, as well as "appropriate," to quote the synonymous language of the Revised Statutes.

3. *The duty to examine the applicant includes the duty, and hence the power, to examine him on oath.*

This proposition has the authority of this court: In *United States v. Bailey* (9 Pet., 238) it was decided that the Secretary of the Treasury, being

empowered by statute to pass upon certain claims, was authorized to require proof by affidavit, and that false matter in such an affidavit was perjury. *There was no statutory authority for the affidavit.* We quote from the opinion (p. 254) :

It is certain that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the Government down to the present time, required the proof of claims against the Government to be by affidavit. In some of these laws authority has been given to judicial officers of the United States to administer the oaths for this purpose; and at least as early as 1818 a similar authority was confided to State magistrates. The citations from the laws made at the argument are direct to this point and establish in the clearest manner *a habit of legislation* to this effect. It may be added that it has been stated by the Attorney General, and is of public notoriety, that there has been a constant practice and usage in the Treasury Department, in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, *whether the same has been expressly required by statute or not*; and that, occasionally, general regulations have been adopted in the Treasury Department for this purpose. Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. The very circum-

stance that the Treasury Department had, for a long period, required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the Government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority.

The court held that the power of the Secretary to require the affidavit " was incident to his duty and authority in settling claims " under the act, saying (p. 255) :

It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts which are to establish the claim. \* \* \* It can not be presumed that Congress were insensible of these considerations or intended to deprive the Secretary of the Treasury of the fullest use of the best means to accomplish the end, viz, to suppress frauds and to ascertain and allow just claims.

See, also, *Leonard v. Lennox*, *supra*; *United States v. Nelson*, 199 Fed., 464, 472; *United States v. Hearing*, 26 Fed., 744; *United States v. Boggs*, 31 Fed., 337; *United States v. Hardison*, 135 Fed., 419.

In *Caha v. United States* (152 U. S., 211, 218), the *Bailey case* was cited and approved, and it was held that a contest before the local land officers between rival claimants under the homestead law was

a proceeding in which, although resting upon the general implied powers of the department and not specifically allowed (though recognized) by statute, an oath might be administered. (See *United States v. Nelson*, *supra*, at p. 473.)

All that was said in the *Bailey case* applies here with equal force. The oath is essential to insure the results of the examination and protect the Government against fraudulent misrepresentations. Everywhere, in its efforts to elicit fact from human testimony, the law relies upon the piety or the fear as well as upon the honor of the witness. To permit a grant of public property to be determined by the mere statement of an unknown and strongly interested applicant would be an outright anomaly. If the countless representations of fact upon the faith of which the public domain is disposed of were not vouched by the solemnity of swearing and the fear of prosecution, many of them would not be worth the paper upon which they are written. This statement, however regrettable its necessity, is compelled by what we all know of the frauds that have been perpetrated in spite of all legal safeguards. In the administration of the public-land laws the Government is peculiarly dependent on the *ex parte* representations of interested claimants. As was said by the court in *United States v. Minor* (114 U. S., 233, 240) :

It is not possible for the officers of the Government, except in a few rare instances, to know anything of the truth or falsehood

of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

In administering the several land laws the department first ascertains what propositions of fact must be established to satisfy the statutory conditions, and then, by general regulation, directs or explains that those which depend on testimony shall be proven by affidavit or deposition. We are confident that the rules, circulars, and decisions of the department will be searched in vain for any serious or long-permitted departure from this wholesome and necessary practice of requiring every material statement to be supported by an oath. While the earliest circular concerning the homestead law of which we have information (circular of September 17, 1867) did not provide for any statement by the claimant respecting former entries, this evident oversight was soon corrected by the general circular of March 10, 1869 (p. 22), which provided a form of initial affidavit containing the statement "that the affiant has not heretofore had the benefit of this act." The same form appeared in the general circular of August 23, 1870 (p. 24). The requirement, or its equivalent, has always been adhered to since. See "Public Domain," page 1034.

The acts of Congress are passed with knowledge of this practice and in reliance on it.

Hence a direction, or an implied authority, to the Land Department to take the statement of a witness or claimant is tantamount to a direction or authority to take it on oath, especially when construed in connection with the general provisions of section 2478, *supra*, and section 2246, *supra*, which declares that it shall be the duty of the register and receiver "to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of the public lands."

4. *That such oaths were intended to be included by section 125 of the Criminal Code (R. S., 5392) is demonstrated by its broad terms and its evident purpose, illuminated by the statutes from which it was derived.*

(a) The language is, "in any case in which a law of the United States *authorizes* an oath to be administered."

To confine this to cases in which an oath is specifically and expressly directed by statute is a clear violation of the terms employed by Congress.

(b) The evident purpose is as broad as the letter.

The purpose was to give value to oaths as a means of protection against mendacity and fraud. The questions of fact which arise in the execution of the laws, as well as in the administration of justice, being kaleidoscopic and countless, it would be folly for the legislature to attempt to anticipate them

all by minute definitions in acts prescribing affidavits or defining perjuries. Hence the statutes, of which there have been many, authorizing or directing generally one department and another to require oaths in aid of the various inquiries submitted to their care, such as Revised Statutes, section 2246, *supra*, directing the registers and receivers "to administer any oath required by law *or* the instructions of the General Land Office." And hence also this penal provision, as wide as the authority thus conferred and necessary to render it effectual. Congress realized that an oath without a penal sanction is for many persons a mere form, worthless as a protective measure. Framed on the broadest possible lines, section 125 must have been intended to cover every possible case in which a witness might be sworn or an affidavit taken under the authority, implied or express, of any Federal law whatsoever.

(c) An inquiry into the antecedents of this section will leave no doubt of its applicability to cases like the present.

The section (R. S., 5392) was framed by the revising committee and by them proposed as the equivalent of a large number and variety of acts defining perjury, a partial list of which they set forth above a note which we will quote presently. (See the revisers' draft and report, vol. 2, p. 2583, Title LXXIII, ch. 4.) Among the acts so listed was the act of March 3, 1857, chapter 116 (11 Stat.,

250), entitled "An Act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," section 5 of which provided:

That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land office in the United States or any Territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any State or Territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land offices, or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office, or other proper officer of the Government of the United States, as under the laws of the United States, in any wise relating to or effecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, wilfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to

the punishment prescribed for that offense by the laws of the United States.

The revisers' note to which we have alluded reads:

The crime of perjury and false swearing occupies a conspicuous place in the laws of the United States, as the foregoing list of acts abundantly shows. The list might be doubled. The legislative practice is to affix the pains and penalties of perjury anew every time an oath is required in any statute, to be taken before either a judicial or administrative officer. It would be well if this growing mass of laws in regard to perjury were no further enlarged. To this end the cited sections of the acts of 1790 and 1825 are so revised and slightly altered as to embrace, it is believed, every case of false swearing, whether in a court of justice or before any administrative officer of the Government. For fear, however, that sections 73 and 74 may not be broad enough to cover every perjury and subornation of perjury, it is recommended that the two following sections, in brackets and italicized, be adopted in lieu thereof. We feel much confidence that no case can occur which these provisions will not reach.

One of the sections thus recommended became Revised Statutes, sec. 5392.

It is, of course, proper to resort to the early statute in the quest for light upon the substitute. See-

tion 5 of the act of 1857,<sup>1</sup> though superseded as an independent enactment, was absorbed in its entirety into the revision. Broad terms took the place of specific provisions but, in effect, continued them as though they were set forth anew in detail. (See *United States v. Nelson, supra*, where this subject is fully covered.)

(d) In the *Caha case, supra*, the court said (p. 220):

All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section.

In *United States v. Hearing, supra*, this perjury act was held to apply to the case of a homestead applicant, who, in his application verified before the clerk of a county court, made a false state-

<sup>1</sup>The first three sections of this act were embraced in the revision, R. S., secs. 5341-5343. Sec. 5596 provides in substance that when any portion of an earlier act is included, the residue shall be deemed repealed, "all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature." The question whether section 5 retained independent force has been mooted in certain cases. (See *Babcock v. United States*, 34 Fed., 87%, per Brewer, J.; *Caha v. United States*, 152 U. S., 211, 216; *United States v. Bedgood*, 49 Fed., 54; and *United States v. Nelson*, 199 Fed., 464, and the cases therein cited.)

ment in order to avail himself of the privilege of Revised Statutes, section 2294, which dispenses with the presence of the applicant at the local land office in certain circumstances. The question was considered by Judge Deady, of Oregon, who, after citing the *Bailey case*, observed (p. 747) :

So here, the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the department might direct or permit that it be done by some such recognized mode of proceeding as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon.

In *United States v. Hardison*, *supra*, the defendant was indicted because of a false affidavit which he had made before a deputy collector of internal revenue concerning his sufficiency as a surety on a distiller's bond. It was held that the general duty of the Commissioner of Internal Revenue and the Secretary of the Treasury to execute the internal-revenue laws empowered them to require such bonds and such oaths from the sureties thereon, and that a general statute authorizing collectors and their deputies to administer oaths "authorized by law or by regulations authorized by law" was sufficient to bring the oath in question within section 5392.

In *United States v. Nelson*, *supra*, it was held that a false affidavit of settlement made in support

of an application to enter under the homestead law land within a national forest, listed as agricultural land pursuant to the act of June 11, 1906 (34 Stat., 233), was an affidavit taken in a case in which a law of the United States authorized the oath to be administered as provided by Revised Statutes, section 5392, although there was no express statutory demand for such an affidavit. Particular attention is invited to the able opinion rendered by District Judge Dietrich. The case is indistinguishable from this one save on the bare ground that the necessity for the regulation arose under a statute passed after section 2290.

5. *The circumstance that certain matters to be covered by the claimant's initial affidavit are specified in section 2290 implies no prohibition against his examination under oath upon other matters which are vital to the right of entry. (United States v. George, 228 U. S., 14, distinguished.)*

The District Court's opinion cites the *George case* and the case of *United States v. Maid* (116 Fed., 650).

In the *Maid case* the charge was based upon a nonmineral affidavit accompanying a homestead application. District Judge Wellborn was of the opinion that in requiring such an affidavit the regulation of the Land Department contradicted Revised Statutes, 2290, *supra*, and therefore must be held inoperative. In this respect his opinion is

sufficiently answered by the opinion of Mr. Justice Van Devanter in *Leonard v. Lennox*, *supra*, page 766, where he said, in speaking of the "nonsaline" affidavit prescribed by the Commissioner and the Secretary:

The power of those officers under the law to adopt such a regulation is not reasonably open to question. Although powerless to adopt a regulation which is in any wise inconsistent with or repugnant to the public land laws, they possess ample power to enforce, by appropriate regulations, every part of those laws as to which it is not otherwise specially provided. (*Williamson v. United States*, 207 U. S., 425, 462; *Cosmos Co. v. Gray Eagle Co.*, 190 U. S., 301, 309; *United States v. Bailey*, 9 Pet., 238, 254; *United States v. Macdaniel*, 7 Pet., 1, 14.) The newly enacted saline-land act in effect prohibited the acquisition of public lands chiefly valuable for salines under any law other than the mineral-land laws, and neither it nor any other law designated any particular means by which this prohibition was to be enforced. Thus the selection of some appropriate means devolved upon the Commissioner, subject to the Secretary's approval. (R. S., secs. 441, 453, 2478; *Bishop of Nesqually v. Gibbon*, 158 U. S., 155, 166.)

The idea that Revised Statutes, 2290, by specification of certain matters inhibits the department from examining the applicant upon others equally material, was rejected by Judge Deady in *United*

*States v. Hearing, supra*, in the following words (p. 746):

It is not directly contended that the existence of these facts was not material to the right of the defendant to make his proof of qualification and purpose, before the clerk, to make an entry under the homestead act, but only that, however material they may have been in that connection, the statute did not require or authorize the defendant to make an oath to them. The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto; and these, when not of record, being within the applicant's knowledge, may be shown by his own oath. As to the facts showing the qualification of the applicant, and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath; and if there were no specific direction in the statute on the subject, I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to these excusatory facts. The mode of their proof is not prescribed, and convenience, usage, and necessity all point to the oath of the party as the proper evidence of their existence. Certainly it would be within the power of the department to make a regulation on the subject, permitting or prescribing this mode of proof in such a case.

The conclusion in *Patterson v. United States* (181 Fed., 970; C. C. A., 9th Cir.), a case arising under the laws concerning patents for inventions, was due (as seems evident from the matter on p. 973 of the report) to an erroneous idea of the part played by executive regulations in cases of this character. We refer to the idea that the regulations define and virtually create the offense, and thereby involve an unconstitutional delegation of legislative power. This fallacious theory is the basis of a number of the lower court decisions relied on in the *Patterson case*, including (in part) the *Maid case*, *supra*, and the case of *United States v. Grimaud* (170 Fed., 205), and its complete repudiation by this court necessarily does away with them all as authoritative precedents. In reversing the *Grimaud case* this court laid down the true doctrine, as follows:

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions “power to fill up the details” by the establishment of administrative rules and regulations. (*United States v. Grimaud*, 220 U. S., 506.)

It is very clear from the homestead law itself that section 2290 could not have been intended to include everything which the applicant must show to entitle him to make entry "under the preceding section." The preceding section (2289) itself lays down conditions which are not mentioned in section 2290, viz, that the applicant shall be a citizen or shall have declared his intention to become such, and that, if he is already the owner of land upon which he resides, the tract entered shall be contiguous thereto and shall not, with the other tract, exceed 160 acres. These conditions, like the emphatic condition of section 2298, and the condition that the land shall be nonmineral (R. S., 2302<sup>1</sup>), all go to the very right of entry. It is incredible that Congress, without an ascertainable reason, could have intended to close the mouth of the applicant in respect of these matters, and thus cripple the department and thwart its efforts to enforce the conditions which Congress prescribed.

This, we submit, is emphatically a case in which the strong purpose of the whole law must qualify the letter of one of its parts. Section 2290 did not dispense with any of the other conditions. The list of subjects which it contains could not have been intended as exhaustive. It provided for certain things; but Congress, realizing that there might be

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<sup>1</sup> SEC. 2302. No distinction shall be made in the construction or execution of this chapter [homesteads] on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

others equally important, left to the department the general duty of enforcing, by appropriate regulations, *every part* of the law "not otherwise specially provided for" (sec. 2478).

Even if section 2290 be given effect literally, it goes no further than to allow the preliminary entry to be made upon the filing of an affidavit as described. This would still leave it incumbent upon the department to examine into the citizenship of the applicant, the matter of former entry, the character of the land, etc. Inquiry concerning all these subjects could be made of the entryman under oath without offense to section 2290, and his answers if false would constitute perjury.

This case is not ruled by the *Williamson case* (207 U. S., 425), for there the regulation required something to be proven which the statute upon which it professed to be based not only did not require, but by necessary implication dispensed with. The regulation required the applicant under the timber and stone law to swear at final proof that he had not made any agreement to convey, whereas the statute was construed by the court to allow such agreements after filing of the initial application and before final proof. In this case the affidavit tends to effectuate the express requirement of the statute.

Neither is our position inconsistent with the ruling in the *George case* (228 U. S., 14). That case turned upon the construction of section 2291 of the Revised Statutes, which, dealing with the final proof of homestead entries, provides that residence

and cultivation shall be proven "by two credible witnesses," i. e., witnesses other than the claimant while certain other and distinct matters shall be established by the affidavit of the claimant himself.<sup>1</sup> In holding that the oath of the claimant could not be added by a regulation to the oaths of the two witnesses on the subject of residence and cultivation, the court not only respected the immediate juxtaposition of the two provisions of the statute (see *Williamson case*, p. 460), but also gave to the first of them a construction which accorded with its evident purpose as well as with its letter. For the residence and cultivation by the claimant (the very essence of the homestead policy), if honestly persisted in throughout the five-year period, will naturally be

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<sup>1</sup> The text of this section is:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. (That the proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the oath of allegiance, required to be made by section 2291 of the Revised Statutes, may be made be-

come known, or can readily be made known, to others; it is desirable, to promote diligence and prevent fraud, that they be thus notorious; and hence it is both practical and wise to require that these facts be established without recourse to the testimony of the claimant himself. The second provision, on the other hand, relating to the matters of alienation and allegiance, necessarily demands his affidavit.

Section 2291 not only specifies matters to be proven, but goes further and declares that a part shall be proven in one way (by strangers to the claim) and the rest in another way (by the claimant), thus in effect prohibiting a resort to the second method to substitute or supplement the first. Section 2290 requires the claimant to testify to certain matters. Other matters (citizenship, ab-

fore the judge, or, in his absence, before the clerk, of any court of record of the county and State, or district and Territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge or the clerk of his court to the register and the receiver, with the fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register.)”

sence of former entry, etc.) are specified in other sections, but as to the method of proving them the statute is silent, leaving it to implication and the powers conferred upon the department. The duty of the claimant to make a showing upon these matters is manifest, and his duty to tell what he personally knows of them is no less so, since they rest so peculiarly within his knowledge that without recourse to his recollection and conscience the proper execution of the law becomes impossible. The statute, by necessary implication, requires his testimony. Any other construction would render section 2298 a dead letter wherever there is a disposition to evade it.

#### CONCLUSION.

It is believed that the doctrine of the decision under review will raise serious difficulties in the administration of the laws in all of the executive departments, will impose unnecessary burdens on Congress, and is not needed for the protection of the citizen. No greater difficulties and uncertainties will be found in ascertaining whether an oath is in line with the express or implied authority of the laws than is experienced in ascertaining whether false testimony delivered in a court of justice is material to the issue. A person who wilfully and corruptly forswears himself in an effort to defraud the Government ought not to receive the protection of refined technicalities. This court has even held

that a defendant prosecuted for filing a false affidavit in support of a claim against the Government is estopped to deny the validity of his oath. *Ingraham v. United States*, 155 U. S., 434, 437.

It is respectfully submitted that the decision of the court below should be reversed.

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